No. 09-532

IN THE

Supreme Court of the United States

THOMAS FRY,

Petitioner,

v.

EXELON CORPORATION
CASH BALANCE PENSION PLAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT EXELON CORPORATION CASH BALANCE PENSION PLAN'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Seventh Circuit, in determining whether petitioner was entitled to a so-called "whipsaw" calculation with respect to his pension benefit from the Exelon Plan, properly interpret 29 U.S.C. § 1002(24) — which defines "normal retirement age" as "the time a plan participant attains normal retirement age under the plan" — to permit the Exelon Plan, as of 2003, to define "normal retirement age" as "the date the Participant completes five years of Vesting Service," instead of applying the interpretation set forth in a 2007 regulation that was adopted after the statute was amended to abolish the "whipsaw" calculation and that changed prior agency interpretations of the statute on an expressly prospective basis?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6, the Exelon Corporation Cash Balance Pension Plan states that it has no parent company and that no publicly traded company owns more than 10% of its stock.

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RESPONDENT EXELON CORPORATION CASH BALANCE PENSION PLAN'S BRIEF IN OPPOSITION

The Exelon Corporation Cash Balance Pension Plan ("Exelon Plan") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Thomas Fry.

COUNTERSTATEMENT OF THE CASE

The decision below (1) interprets a statutory and regulatory scheme that is no longer in effect, (2) neither invalidates nor disregards any agency regulation, and (3) creates no conflict among federal courts of appeals. Nothing decided by the court below or asserted in the petition warrants this Court's review.

I. The Facts

The Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), recognizes two kinds of pension plans: defined contribution plans and defined benefit plans. A defined contribution or "individual account" plan, such as a 401(k) plan, "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account," adjusted for gains, losses, income, and expenses. *Id.* § 1002(34). A defined benefit plan is "a pension plan other than an individual account plan." *Id.* § 1002(35).

The Exelon Plan is a "cash balance plan," which is a form of defined benefit plan that "works like a defined-contribution plan, except that the individual accounts are virtual." Pet. App. 2a. A cash balance plan uses hypothetical bookkeeping accounts that represent the pension benefit of each participant. As with a defined contribution plan, participants in the Exelon Plan are entitled to a lump-sum distribution of their benefits when they quit or retire. *Id.* Petitioner Fry left Exelon in 2003, when he was 55 years old, and received a lump-sum distribution equal to the value of his cash balance account — more than $500,000. *Id.* at 4a.

This litigation focuses on how that lump-sum distribution was calculated. When a participant in a defined contribution plan retires or resigns, he or she is entitled to receive the balance of the account. 29 U.S.C. § 1002(23)(B). In 2003, when Fry left Exelon, the calculation of benefits under cash balance plans was not quite so simple. Although the law has since changed, in 2003 defined benefit plans (including cash balance plans) were subject to different rules intended to ensure that any distribution of benefits

prior to "normal retirement age" would be actuarially equivalent to the value of those benefits if they were received at or after "normal retirement age." *See* Pet. App. 2a.

At the time of petitioner's resignation, certain lump-sum distributions from cash balance plans therefore were subject to what has been termed a "whipsaw" calculation. If a participant in a cash balance plan quit or retired before "normal retirement age," as defined in 29 U.S.C. § 1002(24), then the proper lump-sum distribution was the value of his hypothetical account projected forward to normal retirement age (with the balance being increased in accordance with the plan's investment crediting rate), then discounted back to present value (using a discount rate prescribed in the Internal Revenue Code). *See* Pet. App. 28a; *see also Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 759-60 (7th Cir. 2003). Because of this calculation, if a plan's investment crediting rate exceeded the statutory discount rate, the lump-sum distribution would be higher than the balance of the participant's hypothetical account.

Petitioner claims in this litigation that he resigned before his normal retirement age, and was thus entitled to have his lump-sum distribution increased based on a whipsaw calculation. That claim turns on the definition of normal retirement age. "Normal retirement age" is defined in ERISA to be:

> the earlier of—
>
> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of —

> (i) the time a plan participant attains age 65, or
>
> (ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. § 1002(24). Pursuant to section 1002(24)(A), the Exelon Plan defined normal retirement age as the earlier of, on the one hand, "the date the Participant completes five years of Vesting Service" and, on the other, the later of the participant's 65th birthday and "the fifth anniversary of the date the Participant commenced participation in the Plan." Pet. 7.

Petitioner does not dispute that, at the time of his resignation, he had reached normal retirement age according to this plan definition. Petitioner argues instead that the Exelon Plan's definition of normal retirement age was outside the bounds of the statute. He contends that a plan's normal retirement age must be a single chronological "age" (such as age 65) that is the "normal" age for retirement in the relevant industry, and cannot be defined by reference to a period of service. *See* Pet. 16-21. Both the district court and the Seventh Circuit rejected the contention that the statute imposed any such restriction on a plan's definition of normal retirement age.

In 2006, long after Fry's resignation from Exelon and receipt of the lump-sum distribution from the Exelon Plan, Congress enacted the Pension Protection Act of 2006, which abolished the whipsaw calculation for cash balance plans for periods after the Act's August 17, 2006 effective date. 29 U.S.C. § 1053(f)(1)(B). In 2007, as part of a policy change permitting phased retirements and retirement plan distributions while participants are still employed (*see* Pet. App. 19a), the Treasury Department adopted

new regulations that require that plans' definitions of normal retirement age correspond to the age when participants customarily retire. 26 C.F.R. § 1.401(a)-1(b)(2). The Treasury Department, noting that it had previously ruled that a plan could define normal retirement age "regardless of the age at which employees customarily retire," Distributions from a Pension Plan Upon Attainment of Normal Retirement Age, 72 Fed. Reg. 28,604, 28,604 (May 22, 2007), expressly made its new regulations prospective in effect, 26 C.F.R. § 1.401(a)-1(b)(4). The Exelon Plan thereafter amended its definition of normal retirement age to comply with the new Treasury requirements.

II. District Court Proceedings

In rejecting petitioner's claim, the district court noted that section 1002(24)(A) "does not use 'age' as a stand-alone term, but instead states 'normal retirement age under the plan.' Moreover, the statute references the 'time' at which the participant attains normal retirement age, not the 'age' at which the participant attains normal retirement age." Pet. App. 32a. The court expressly considered the administrative interpretations cited by petitioner, *id.* at 33a-35a (citing Rev. Rul. 78-120, 1978-1 C.B. 117; 26 C.F.R. § 1.411(a)-7(b)(2)), as well as the case law on which petitioner relied, *id.* at 35a-37a (citing *Duchow v. New York State Teamsters Conf. Pension & Ret. Fund*, 691 F.2d 74 (2d Cir. 1982), *cert. denied*, 461 U.S. 918 (1983); *Laurent v. PricewaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006)). The court found that the administrative interpretations did not support petitioner's position. To the contrary, they reflected the Internal Revenue Service's view that a plan "'may' specify any age under 65 as the normal retirement age." *Id.* at 33a (citing Rev. Rul. 78-120,

1978-1 C.B. 117); *see also* Rev. Rul. 80-276, 1980-2 C.B. 131; Rev. Rul. 78-331, 1978-2 C.B. 158. As for petitioner's cases, the court found none of these precedents persuasive. Pet. App. 38a ("There are no controlling nor compelling precedents on the issue before the court.").

The district court concluded that

> [w]hile the language of § 1002(24)(A) is open to interpretation, the better reading is that a plan may set a time (prior to the employee reaching age 65) that will qualify as normal retirement age, either by setting a specific age, a period of service or participation, or a combination of age and service/participation.

Pet. App. 38a Thus, the Exelon Plan's definition of normal retirement age was permitted under the statute. *Id.* Petitioner accordingly "had reached normal retirement age at the time he retired. Therefore, he was not entitled to an additional distribution based on a whipsaw calculation." *Id.* at 38a-39a.

Following the district court's dismissal of his claim, petitioner sought reconsideration on the ground that the court had failed to consider the 2007 Treasury regulation, 26 C.F.R. § 1.401(a)-1(b)(2); *see also* 72 Fed. Reg. 28,604, on which petitioner relies here. *See* Pet. 14-15, 21-29. That regulation provides that "normal retirement age under a plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." 26 C.F.R. § 1.401(a)-1(b)(2). The district court found that reconsideration of its order was not warranted:

> In [the prior opinion], the new regulation was not addressed because it is *prospective only and therefore inapplicable to plaintiff's lump sum distribution* that occurred years prior to the effective date of the new regulation. Plaintiff now argues that, even if not directly applicable to his situation, the regulation is an administrative interpretation of the statute that is subject to deference and instructive as to how the relevant statutes should be construed. There, however, is no indication that the new rule is based on a reinterpretation of the statutory definition of normal retirement age. The new regulation, which is prospective in nature, clearly states that prior to the May 22, 2007 effective date, a plan was "permitted to have a normal retirement age lower than age 65, regardless of the age at which employees customarily retire in a particular company or industry." 72 Fed. Reg. 28,604 (May 27, 2007) (citing Rev. Rul. 78-120, 1978-1 C.B. 117).

Pet. App. 20a (emphasis added).

III. Seventh Circuit Proceedings

The Seventh Circuit affirmed. The court first rejected petitioner's claim that the Exelon Plan's definition was improper because it did not define normal retirement age as an "age": "the Plan's formula — the participant's age when beginning work plus five years — is an 'age.' It is employee specific, to be sure, but 'age + 5' remains an age." Pet. App. 6a. Next, the court rejected petitioner's argument that the Exelon Plan's normal retirement age was not "normal": "§1002(24) does not compel a pension plan's retirement age to track the actuarial tables. If it did, then instead of granting discretion to the plan's sponsor the statute would read something like:

'The term "normal retirement age" means the median age at which participants in the plan retire.'" *Id.*

Finally, the court rejected petitioner's assertion that the 2007 regulation compelled a different result. "Fry contends that this regulation supports his position. It does not, because like almost all regulatory changes it operates only prospectively.... The regulation therefore does not affect the calculation of lump-sum distributions in 2003." Pet. App. 7a (citations omitted). The court went on to note that "[w]hether the regulation is within the scope of the agency's interpretive discretion, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is a question not presented here." *Id.*

REASONS FOR DENYING THE PETITION

Petitioner's claim does not warrant this Court's review. First, the petition presents an issue of no ongoing significance. In 2006, ERISA was amended to abolish the whipsaw calculation — foreclosing claims like petitioner's in the future. And a Treasury regulation effective as of May 2007 prospectively changed the administrative interpretation of the statute and imposed new restrictions on plans' definitions of normal retirement age that will govern future cases.

Second, petitioner has not identified and cannot identify any points in the Seventh Circuit's opinion that require correction by this Court. Petitioner is simply incorrect to assert that the Seventh Circuit "invalidated" the 2007 Treasury regulation or departed from this Court's holdings under *Chevron* and its progeny. The Seventh Circuit's approval of the Exelon Plan's definition of normal retirement age did not hold or even suggest that the new Treasury

regulation is inconsistent with the statute. And instead of disregarding the 2007 regulation — promulgated four years after distribution of petitioner's benefits — the court correctly found that the new regulation did not retroactively apply to petitioner's claim and properly declined to decide whether that regulation was within the scope of the agency's interpretive discretion. Pet. App. 7a.

Finally, the Seventh Circuit's opinion did not create a conflict among the circuits. The Second Circuit opinion cited by petitioner, *Duchow v. New York State Teamsters Conf. Pension & Ret. Fund*, 691 F.2d 74 (2d Cir. 1982), addressed a separate provision of ERISA altogether. The petition should be denied.

I. THE QUESTION PRESENTED IN THIS CASE IS OF NO ONGOING SIGNIFICANCE.

The issue in this case — whether, in 2003, petitioner was entitled to a whipsaw calculation based on the ERISA definition of "normal retirement age" — has been superseded by subsequent changes in the law. Because of statutory and regulatory changes since 2003, the question presented by the petition will not arise in the future.

First, in 2006, Congress enacted the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780. That statute, codified as relevant at 29 U.S.C. § 1053(f)(1)(B), abolished the whipsaw calculation altogether. *See* Pet. App. 2a (in 2006, "the addition to ERISA of 29 U.S.C. § 1053(f) brought the treatment of lump-sum distributions [from defined benefit and defined contribution plans] into harmony"). Thus, as the Seventh Circuit stated, the opinion below addresses only "the interaction between § 1002(24) and the *pre-2006* requirement of actuarial adjustments to the hypothetical balance" of a defined

benefit plan account. *Id.* at 8a (emphasis added). No whipsaw calculation claim like petitioner's can be brought under the new statutory scheme.

Second, the Treasury Department's 2007 regulation imposing restrictions on plans' definitions of normal retirement age will govern any disputes about such definitions after the 2007 effective date of the regulation. *See* 26 C.F.R. § 1.401(a)-1(b)(2) & (4); 72 Fed. Reg. at 28,605 ("modif[ying]" existing regulations and providing "rules restricting a plan's normal retirement age"). That regulation was not in effect when petitioner received his lump-sum distribution in 2003, *see infra*, at 13-15, but its effective date provision makes clear that it generally applies to all plans as of May 22, 2007. 26 C.F.R. § 1.401(a)-1(b)(4). Thus, petitioner challenges an interpretation of normal retirement age under the statute — arising in the context of the pre-2007 statutory and regulatory environment — that will have little or no significance going forward.

Because the Seventh Circuit's opinion will not govern future claims under ERISA, it does not warrant this Court's review.

II. THE SEVENTH CIRCUIT DID NOT MISAPPLY *CHEVRON* OR INVALIDATE ANY TREASURY REGULATION.

Petitioner asserts that the Seventh Circuit "held that [§ 1002(24)] unambiguously gives retirement plans *unfettered* discretion to define 'normal retirement age,' thereby invalidating the Treasury regulations on this subject." Pet. 15. Petitioner's description of the Seventh Circuit's holding is simply incorrect, and his argument that the effect of that holding is to invalidate the 2007 regulation is accordingly wrong. Petitioner further argues that the

Seventh Circuit failed to give *Chevron* deference to the 2007 regulation. But that too is a mistaken reading of the opinion: instead, the court correctly found that the legislative rule promulgated in 2007 did not apply to petitioner's claim.

1. Nothing in the Seventh Circuit's opinion suggests that section 1002(24)'s definition of "normal retirement age" permits only one interpretation. *See* Pet. App. 6a-7a. The only question before the Seventh Circuit, and the only question the court reached, was whether the Exelon Plan's definition of normal retirement age was consistent with the statutory text. *See id.* at 7a (issue beyond that proposition "not presented here"). That text broadly states that "normal retirement age" may be "the time a plan participant attains normal retirement age *under the plan*." 29 U.S.C. § 1002(24)(A) (emphasis added). The Seventh Circuit held only that this statutory definition allowed the Exelon Plan's pre-2007 treatment of normal retirement age, and that Fry's attempts to restrict the statutory definition based on dictionary definitions of "normal" and "age" were not supported by the statutory text. Pet. App. 6a-7a; *see also Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

Accordingly, petitioner's assertion that review is warranted because the Seventh Circuit's decision "invalidat[es]" the 2007 regulation, Pet. 15-16, is mistaken. The Seventh Circuit expressly stated that "[w]hether the [2007] regulation is within the scope of the agency's interpretive discretion, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is a question not presented here." Pet. App. 7a. Moreover, petitioner's argument

is directly contrary to this Court's holding that a "judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *see also Chevron*, 467 U.S. at 843 n.11 (court may uphold regulation even if it is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding"). Because nothing in the Seventh Circuit's opinion even suggests that the statute bars the exercise of agency discretion, its decision as to the validity of the Exelon Plan's definition of normal retirement age in 2003 has no effect on the 2007 regulation.

Indeed, there is nothing improper about an agency adopting one interpretation of a statute at one time and a different interpretation later, under different circumstances, as the Treasury Department did here. *Chevron* itself involved this kind of a change — the Environmental Protection Agency changed its interpretation of the statutory term "stationary source" to implement the new policy directives of a new administration. As this Court explained, an agency interpretation of statutory language "is not instantly carved in stone," and the flexibility to adopt different interpretations of a statute to adapt to different policies and circumstances is a hallmark of the administrative process. 467 U.S. at 863. Here, the Treasury Department changed its position and adopted a *new* regulation to implement a *new* policy — the policy permitting phased retirement. *See* 72 Fed. Reg. at 28,604-05; Pet. App. 19a. Nothing in the Seventh Circuit's approval of a definition of

normal retirement age that was consistent with the prior administrative interpretation casts any doubt on the validity of the new interpretation. *See Long Island Care At Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (a change in agency interpretation alone presents no ground for disregarding a new interpretation).

2. Similarly, petitioner is incorrect to assert that the Seventh Circuit "refus[ed] to give *Chevron* deference to" the 2007 Treasury regulation. Pet. 16, 27. Contrary to Fry's assertion, the Seventh Circuit did not address whether *Chevron* deference to 26 C.F.R. § 1.401(a)-1(b)(2)(i) was warranted, because that regulation does not apply to Fry's claim. *See* Pet. App. 7a. Both the Seventh Circuit and the district court found that the 2007 regulation was not applicable in this litigation because it was adopted four years after the 2003 distribution of Fry's benefits, and was expressly given only prospective effect. *Id.* at 7a, 19a-21a. The courts' findings were both correct and unexceptional.

The 2007 Treasury regulation is a legislative rule that does not purport to apply retroactively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). To the contrary, the regulation's codification includes a highly detailed "effective date" provision which sets forth precisely when the regulation becomes effective for specific types of plans — none before 2007.[1]

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[1] *See* 26 C.F.R. § 1.401(a)-1(b)(4) ("Except as otherwise provided in this paragraph (b)(4), paragraphs (b)(2) and (3) of this

Additionally, as the district court explained, the Treasury Department made clear that the new regulation implemented a forward-looking "policy change." Pet. App. 19a. The Treasury Department expressly stated that "[t]his Treasury Decision *modifies* existing regulations" and "include[s] rules *restricting* a plan's normal retirement age." 72 Fed. Reg. at 28,605 (emphases added). The Federal Register release explains that under prior regulations, "a pension plan is permitted to have a normal retirement age lower than age 65, *regardless of the age at which employees customarily retire in the particular company or industry*." *Id.* at 28,604 (emphasis added) (citing Rev. Rul. 78-120 (1978-1 CB 117)). The 2007 regulation — after notice and comment — changed that rule for the future. *Id.* at 28,605 (stating that final rules impose "a requirement that the normal retirement age under a plan be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed"). The 2007 regulation is a classic example of a forward-looking legislative rule which changes existing policy and which contains no language that "requires" retroactive treatment. *Bowen*, 488 U.S. at 208. The Seventh Circuit was thus correct — and indeed required — not to treat the regulation as having retroactive effect. *Id.*; *see also Greene v.*

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section are effective May 22, 2007. In the case of a governmental plan ..., paragraphs (b)(2) and (3) of this section are effective for plan years beginning on or after January 1, 2009. In the case of a plan maintained pursuant to one or more collective bargaining agreements ..., paragraphs (b)(2) and (3) of this section do not apply before the first plan year that begins after the last of such agreements terminate determined without regard to any extension thereof ....").

United States, 376 U.S. 149, 160 (1964) (holding that under "'the first rule of construction ... that legislation must be considered as addressed to the future, not to the past,'" "it would be unjustifiable to give the 1960 regulation retroactive effect").

Petitioner asserts that *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), compelled the Seventh Circuit to apply the 2007 regulation to his 2003 benefit distribution. Pet. 22-26. But *Smiley* does not hold that a legislative rule that implements a change in regulatory policy must be given retroactive effect. In *Smiley*, this Court held that deference should be given to an agency's regulation *interpreting* — not changing — existing law. 517 U.S. at 741-44. The Court made clear that the interpretive regulation did not change the agency's substantive position. *See id.* at 742 ("[W]e do not think that anything which can accurately be described as a change of official agency position has occurred here. The agency's Notice of Proposed Rulemaking asserted that the new regulation 'reflect[s] current law ....'") (alteration in original). Indeed, although the *Smiley* petitioner had not meaningfully argued that deference to the agency's interpretation of existing law would amount to giving the regulation improper retroactive effect, the Court noted that "[t]here might be substance to" such an argument "if the regulation replaced a prior agency interpretation — which, as we have discussed, it did not." *Id.* at 744 n.3 (citing *Bowen*, 488 U.S. at 208-09). Here, where the 2007 regulation *did* implement a policy change and *did* replace a prior agency interpretation, *Smiley* does not apply.

III. THE SEVENTH CIRCUIT DID NOT CREATE A CONFLICT WITH THE SECOND CIRCUIT.

Petitioner also contends that the Seventh Circuit's decision "is directly at odds with the conclusion reached on this precise issue by the Second Circuit in *Duchow*" which, according to petitioner, "focused on the same question at the heart of this case." Pet. 29. But *Duchow* did not concern a plan-based definition of normal retirement age, but rather focused on a different ERISA provision altogether: 29 U.S.C. § 1053(a). *See Duchow*, 691 F.2d at 76-77; *see also* Pet. App. 35a ("Whether, consistent with § 1002(24)(A), normal retirement age could be measured by service time was not an issue before the [*Duchow*] court.").

Duchow held that, under section 1053(a), a plan cannot impose a service-based vesting requirement that is later than the statutory ceiling for normal retirement age. 691 F.2d at 80. Ignoring the actual holding of *Duchow*, petitioner focuses (at 30) on the *Duchow* court's observation that ERISA imposes "two discrete vesting requirements," one of which, normal retirement age, is "linked to age without regard to length of service," while the other, a years of service requirement, "depend[s] on length of service without regard to age." 691 F.2d at 77. The district court below recognized that this was merely a pithy way of explaining that normal retirement age is a distinct, stand-alone vesting benchmark under section 1053(a). *Duchow*, the district court explained, "did not actually address the issue of a normal retirement age based on service time," and the sentence cited by petitioner was "*dictum*." Pet. App. 35a-36a. In fact, *Duchow* went on to acknowledge that "[u]nder the statutory definition of 'normal retirement age,'

vesting cannot occur earlier than the tenth anniversary of the employee's joining the plan, *unless the plan itself provides for an earlier date.*" 691 F.2d at 78-79 (emphasis added). The court would not have used the term "date" rather than "age" if it intended to suggest that normal retirement age had to be defined as a single, specified age.

Because *Duchow* does not address the issue presented by petitioner's claim, there is no conflict between the Seventh Circuit and the Second. As the Seventh Circuit itself explained, its opinion "is the first appellate opinion" addressing the issue presented here.[2] Pet. App. 8a ("As far as we can tell, ours is the first appellate opinion on the interaction between §1002(24) and the pre-2006 requirement of actuarial adjustments to the hypothetical balance."). A number of other courts have also, without addressing the precise issue presented here, considered plans with normal retirement ages defined by years of service without intimating that the plans somehow violated ERISA. *See Ryan v. Asbestos Workers Union Local 42 Pension Fund*, 27 F. App'x 100 (3d Cir. 2002); *Bance v. Alaska Carpenters Ret. Plan*, 829 F.2d 820 (9th Cir. 1987); *Carter v. Central States, Se. & Sw. Areas Pension Plan*, 656 F.2d 575 (10th Cir. 1981); *Kern v. Retirement Plan for Employees of L.B.R., Inc.*, 751 F. Supp. 788 (S.D. Ind. 1990); *Nichols v. Board of Trs.*, 1 Empl. Benefits Cas. (BNA) 1868 (D.D.C. 1979);

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[2] Petitioner also points to a district court decision, *Laurent v. PricewaterhouseCoopers, LLP*, 448 F. Supp. 2d 537, 545-46 (S.D.N.Y. 2006), which held that "'a normal retirement age cannot be defined in reference to years of service.'" Pet. 31-32. As the district court here explained, the *Laurent* court mistakenly followed the same faulty interpretation of *Duchow* advanced by petitioner. Pet. App. 35a-36a.

Deonarain v. New York Life Ins. Co., No. 8:04CV466, 2005 WL 2002081, at *4 (D. Neb. Aug. 18, 2005); *Wachtell, Lipton, Rosen & Katz v. Comm'r*, No. 14574-90, 1992 WL 162645 (U.S. Tax Ct. July 14, 1992), *aff'd*, 26 F.3d 291 (2d Cir. 1994). All of these decisions are consistent with the Seventh Circuit's decision in this case.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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